

*United States Court of Appeals
for the Second Circuit*



**PETITIONER'S
BRIEF**

76-4015

B
PJS

UNITED STATES COURT OF APPEALS

For the Second Circuit

MARILYN INA WILLIAMS,

Petitioner

-against-

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent

PETITION FOR REVIEW

BOARD OF IMMIGRATION APPEALS

PETITIONER'S BRIEF

Edelman & Aronowitz
Attorneys for Petitioner
225 Broadway
New York, New York 10007

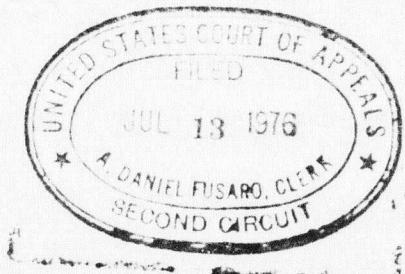


Table of Contents

| | <u>Page</u> |
|--|-------------|
| Table of Cases | 1 |
| Statutes Involved | 2 |
| Statement of the Issues Presented for Review | 4 |
| Statement of the Case | 4 |
| Argument | |
| <u>Point I</u> | |
| The Petitioner has established by incontrovertible evidence her statutory eligibility for suspension of deportation pursuant to Section 244(a)(1) of the Immigration and Nationality Act, as amended, [8 U.S.C. 1254(a)(1)]. | 8 |
| <u>Point II</u> | |
| The Petitioner is worthy of the favorable exercise of discretion by the Attorney General. Failure to exercise discretion favorably is inconsistent with prior holdings of the Immigration Service and of the Congress. | 12 |
| <u>Point III</u> | |
| Each and every statement and citation by the Board of Immigration Appeals in support of its decision of December 30, 1975, denying the motion to reopen deportation proceedings is either erroneous or inappropriate. | 16 |
| Conclusion | 19 |

Table of Cases

| | <u>Page</u> |
|--|-------------------------|
| <u>Aalund v. Marshall</u> , 461 F.2d 710 (5th Cir. 1972)..... | 11 |
| <u>Acosta v. Gaffney</u> , (Civil Action No. 76-709, decided May 12, 1976, U.S. District Court, New Jersey). | 11 |
| <u>Adel v. Shaughnessy</u> , 183 F.2d 371 (2d Cir. 1950)..... | 13 |
| <u>Matter of Erodita Agard</u> , (Special Inquiry Officer, New York, New York, 1973)..... | 14, 15, 18, app., 57 |
| <u>Matter of C--</u> , 7 I&N Dec. 608 (BIA, 1957)..... | 14 |
| <u>Matter of H-- C--</u> , 5 I&N Dec. 212 (BIA, 1953)..... | 14 |
| <u>Gonzalez-Cuevas v. INS</u> , 515 F.2d 1222 (5th Cir. 1975). | 11 |
| <u>James v. Shaughnessy</u> , 202 F.2d 519 (2d Cir. 1953)..... | 13 |
| <u>Kaloudis v. Shaughnessy</u> , 180 F.2d 489 (2d Cir. 1950).. | 13 |
| <u>Kimm v. Rosenberg</u> , 363 US 405 (1960)..... | 13 |
| <u>Matter of M-- L--</u> , 5 I&N Dec. 214 (BIA, 1953)..... | 14 |
| <u>Matter of W-- Y-- L--</u> , 5 I&N Dec. 637 (BIA, 1954)..... | 14 |
| <u>Matter of Lam</u> , Interim Decision 2130 (BIA, 1972)..... | 16, 17, 18, app., 70 |
| <u>LoDuca v. Neelly</u> , 213 F.2d 161 (7th Cir. 1954)..... | 14 |
| <u>Matter of P--</u> , 5 I&N Dec. 651 (BIA, 1954)..... | 13 |
| <u>Perkins v. Elq</u> , 307 US 325 (1939)..... | 9 |
| <u>Matter of Sipus</u> , Interim Decision 2172 (BIA, 1972).... | 16, 17, 18, app., 62 |
| <u>United States ex rel. Hintopoulos v. Shaughnessy</u> , 353 US 72 (1957)..... | 10 |
| <u>United States v. Wong Kim Ark</u> , 169 US 649 (1898)..... | 10 |
| <u>Weddeke v. Watkins</u> , 166 F.2d 369 (2d Cir. 1948)..... | 13 |

Statutes Involved

Section 241(a)(2) of the Immigration and Nationality Act of 1952, as amended [8 U.S.C. 1251(a)(2)]:

Sec. 241. (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who---
(2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this Act or in violation of any other law of the United States;

Section 244(a) of the Immigration and Nationality Act of 1952, as amended [8 U.S.C. 1254(a)]:

Sec. 244. (a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and --

(1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence; or
(2) is deportable under paragraphs (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of

section 241(a); has been physically present in the United States for a continuous period of not less than 10 years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

Section 244(e) of the Immigration and Nationality Act of 1952, as amended [8 U.S.C. 1254(e)]:

(e) The Attorney General may, in his discretion, permit any alien under deportation proceedings, other than an alien within the provisions of paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of section 241(a) (and also any alien within the purview of such paragraphs if he is also within the provisions of paragraph (2) of subsection (a) of this section), to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection.

Statement of the Issues Presented for Review

Whether or not the Board of Immigration Appeals' refusal to reopen deportation proceedings to permit the petitioner to apply for suspension of deportation was an abuse of discretion.

Statement of the Case

The petitioner is a 27-year-old native and citizen of Belize, formerly British Honduras. She entered the United States in October 1968, as a temporary visitor for pleasure and has been physically present in this country since that time. On February 28, 1970, the petitioner married Kenneth Williams, a lawful permanent resident of the United States. On March 31, 1970, the petitioner and her husband had a child, Sheldon Dean Williams, born in Amityville, New York. The petitioner and her husband were divorced on October 30, 1974, in the Supreme Court of the State of New York, County of Suffolk. Custody of their United States citizen child was awarded to the petitioner and they now reside in Amityville, New York. (Appendix p.44)

An Order to Show Cause in deportation proceedings was issued on August 5, 1974, charging the petitioner with being a deportable alien on the grounds that she had remained

in the United States longer than permitted without authority.

(Appendix p.56) At a hearing before an Immigration Judge on August 16, 1974, the petitioner conceded deportability and, in view of her good moral character, was granted voluntary departure in lieu of deportation for a period of four months, subject to any extension that might be granted by the District Director. (Appendix p.49, transcript at p.50)

On December 13, 1974, prior to the expiration of the petitioner's voluntary departure status, an application was made to the District Director to extend said status in view of her equities in the United States and approaching eligibility to apply for suspension of deportation.

(Appendix p.42) The request was denied by the District Director on December 30, 1974. (Appendix p.41) A warrant of deportation was issued on January 13, 1975. The petitioner, subsequently, was requested to surrender for deportation on April 21, 1975.

On April 11, 1975, the petitioner submitted a motion to reopen deportation proceedings and a request for a stay of deportation. (Appendix p.40) On the same day, the District Director administratively denied the application (Appendix p.39) and referred the matter to the Trial Attorneys for presentation to an Immigration Judge. By April 16, 1975, no

action was taken by an Immigration Judge on the motion to reopen proceedings. In view of the fact that submission of such a motion does not operate to stay deportation, a declaratory judgment action was instituted in the United States District Court for the Southern District of New York seeking an order restraining the District Director from incarcerating or deporting the petitioner prior to consideration of her request for suspension of deportation.

On Friday, April 18, 1975, the last business day prior to the scheduled surrender for deportation, the Immigration Judge considered the petitioner's motion to reopen deportation proceedings. (Transcript, appendix p. 29) At 2:00 p.m. on that date the Immigration Judge denied the motion. (Appendix p.27) Although that decision was appealable to the Board of Immigration Appeals, the Immigration Judge refused to stay deportation. (Appendix p.38) The facts were then telephonically communicated to the Board of Immigration Appeals along with a request for a stay of deportation. When it became obvious that no decision would be made that day, an application for an order to show cause was submitted to the District Court. That application was signed at 4:45 p.m. on consent of the

government and provided for a stay of deportation and a hearing on April 28, 1975. (Appendix p.22) It was subsequently stipulated by the parties that the deportation of the petitioner would be stayed pending a final determination by the Board of Immigration Appeals in the matter of her motion to reopen deportation proceedings. The order to show cause was withdrawn. (Appendix p.21) On July 8, 1975, the Board of Immigration Appeals dismissed the petitioner's appeal from the Immigration Judge's decision denying a stay of deportation and reinstatement of voluntary departure status. (Appendix p.12)

For the next several months no further action was taken by the District Director to enforce the petitioner's departure. On October 6, 1975, the petitioner moved to reopen deportation proceedings for the purpose of permitting her to apply for suspension of deportation. The Board of Immigration Appeals, on December 30, 1975, denied the motion. (Appendix p.1) The petitioner now seeks review of that order by the Board of Immigration Appeals.

Argument

Point I

The petitioner has established by incontrovertible evidence her statutory eligibility for suspension of deportation pursuant to Section 244(a)(1) of the Immigration and Nationality Act, as amended [8 U.S.C. 1254 (a)(1)].

The petitioner, at her deportation hearing, conceded deportability under Section 241(a)(2) of the Immigration and Nationality Act, (hereinafter the "Act") as amended, [8 U.S.C. 1251(a)(2)], as an overstay temporary visitor. (Text of statute at p.2, see also Order to Show Cause at appendix p.56.) She is not and has never been charged with being deportable under any of the paragraphs listed in Section 244(a)(2) of the Act. (Section 244(a) is set forth at pages 2 and 3.) It is, therefore, necessary for the petitioner to establish seven years of continuous physical presence, good moral character, extreme hardship, and the unavailability of an immigrant visa in order to be statutorily eligible for suspension of deportation.

It is undisputed by the respondent that the petitioner has been continuously physically present in the United States since October 1968, a period of time in excess of seven years.

No evidence whatsoever was introduced at her deportation hearing (transcript at appendix p.50) to establish that the petitioner is other than a person of good moral character. At that time, she was granted voluntary departure in lieu of deportation pursuant to Section 244(e) of the Act [8 U.S.C. 1254(e)] (reproduced at page 3).

Voluntary departure under that section of statute may only be granted to an alien who has established good moral character for at least five years immediately preceding the application therefor. The petitioner has never been convicted or charged with any crime. (See appendix p.11 for good conduct certificate dated August 5, 1975, by the Police Department, County of Suffolk, New York.) It is undisputed that the petitioner is a person of good moral character.

The deportation of the petitioner would cause an extreme hardship both to her and to her six-year-old United States citizen child. There is no dispute as to the citizenship status of the child despite his alien parentage. See Perkins v. Elq, 307 U.S. 325 (1939). The Supreme Court, in an opinion by Chief Justice Hughes, held:

On her birth in New York, the plaintiff became a citizen of the United States. ...

As at birth she became a citizen of the United States, that citizenship must be deemed to continue unless she has been deprived of it through the operation of a treaty or congressional enactment or by her voluntary action in conformity with applicable legal principles.

It has never been suggested that the petitioner's child is anything other than a citizen of the United States.

See also United States ex rel. Hintopoulos v. Shaughnessy, 353 U.S. 72 (1957); United States v. Wong Kim Ark, 169 U.S. 649 (1898). In Wong Kim Ark, the Supreme Court held:

But citizenship by birth is established by the mere fact of birth under the circumstances defined in the Constitution. Every person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States, ...

The Supreme Court of the State of New York, County of Suffolk, on October 30, 1974, awarded custody of the petitioner's child, Sheldon Dean Williams, to the petitioner. (Appendix p.44) Pursuant to said decree, the child's father was awarded visitation rights.

It is clear that removal of the petitioner's child to Belize would effectively sever the ties between the child and his natural father. It is not reasonable to suggest that the petitioner depart from the United States and leave her child with his father. The Supreme Court of the State of New York has already determined that the best interests

of the child would be served by awarding custody to his mother. Deportation of the petitioner would, therefore, result in the de facto deportation of her United States citizen child. See Aalund v. Marshall, 461 F.2d 710, 714 (5th Cir. 1972); Gonzalez-Cuevas v. INS, 515 F.2d 1222, 1224 (5th Cir. 1975); Acosta v. Gaffney, Civil Action No. 76-709, decided May 12, 1976, U.S. District Court for New Jersey.

In addition, removal of the petitioner's child from the United States would disrupt his education, separate him from all of his friends and subject him to a tropical environment in an economically depressed area.

If the petitioner had been born in one of the independent countries of the Western Hemisphere, it might reasonably be expected she could return to the United States within two or three years. However, her birth in British Honduras, a sub-quota area, effectively precludes her return to the United States until after her child's 21st birthday. Under present immigration law and regulation, it does not appear that an immigrant visa will be available for the petitioner for at least fifteen years.

Deportation of the petitioner will strip her citizen child of his right to remain in the country of his

birth for the duration of his minority. The petitioner does not possess any particular employment skills with the resultant likelihood that she and her child would suffer economic ruination in Belize.

The petitioner, thus, is in compliance with all of the statutory requirements for suspension of deportation.

Point II

The petitioner is worthy of the favorable exercise of discretion by the Attorney General. Failure to exercise discretion favorably is inconsistent with prior holdings of the Immigration Service and of the Congress.

Evidence has been presented and is not controverted to the effect that the petitioner is a person of good moral character and is without a record of criminal activity. She has an outstanding equity in the United States in the form of a child who would suffer extreme hardship in the event of deportation. The petitioner has held steady employment and has a good record with respect to the payment of taxes. She has never done anything to abuse the body politic of the United States. Her whereabouts have been known to the Immigration Service and were it not for matrimonial differ-

ences between the petitioner and her former husband, she would have long ago achieved permanent resident status.

Since suspension of deportation, by statute, is granted as a matter of discretion, the Attorney General must be allowed wide latitude. However, the Immigration Service strives for "Uniformity of Decisions" and under the doctrine of stare decisis, must not be allowed to totally abandon precedent.

Administrative decisions regarding applications for suspension of deportation which are granted are not generally published. A clearer picture of the standards required to permit the favorable exercise of discretion may be had by examining instances where such discretion has been refused. These include membership in subversive associations or participation in such activities, see: Kaloudis v. Shaughnessy, 180 F.2d 489 (2d Cir. 1950); James v. Shaughnessy, 202 F.2d 519 (2d Cir. 1953); Kimm v. Rosenberg, 363 US 405 (1960) (refusal to answer question as to Communist Party membership justified denial), criminal activities or convictions, see: Weddeke v. Watkins, 166 F.2d 369 (2d Cir. 1948), cert. den. 333 US 876; Adel v. Shaughnessy, 183 F.2d 371 (2d Cir. 1950); In the Matter of P--, 5 I&N Dec. 651 (BIA, 1954), deliberate violations or evasions of

immigration laws where there are no outstanding equities, see: In the Matter of H-- C--, 5 I&N Dec. 212 (BIA, 1953); In the Matter of M-- L--, 5 I&N Dec. 214 (BIA, 1953); In the Matter of W-- Y-- L--, 5 I&N Dec. 637 (BIA, 1954); Matter of C--, 7 I&N Dec. 608 (BIA, 1957); LoDuca v. Neelly, 213 F.2d 161 (7th Cir. 1954).

It is clear that the adverse factors which led to a declination of the favorable exercise of discretion in the above matters are absent in the situation at hand.

The Matter of Erodita Agard (Decision of Special Inquiry Officer, New York, New York, March 19, 1973), an unpublished grant of suspension of deportation, closely parallels the petitioner's situation. Erodita Agard and Marilyn Ina Williams were both born in Belize. They are of similar age and both established good moral character and favorable employment records, without particular skills. Agard was the widow of a United States citizen and had two young children. Williams is the divorcee of a lawful permanent resident with one young child. The Agard decision (reproduced in its entirety at appendix, p. 57) includes the following paragraph with respect to hardship:

Respondent asserts that if required to leave the United States extreme hardship would ensue to her and the two United States citizen

children. She states the children would have to accompany her to British Honduras and that they would then lose the advantage of an American education and upbringing. Respondent states additionally the loss of the freedoms, opportunities and the democracy existing here would be a most serious deprivation both to them and her. Moreover, outside the United States respondent could not within the reasonably foreseeable future obtain an immigrant visa because unable to procure the labor certification called for by Section 212(a)(14) of the Immigration and Nationality Act. Requiring the departure of respondent, widow of a G.I. and mother of two citizen children, would be an extreme hardship both for her and those children.

The hardship factors in both cases are similar.

Agard had two children - Williams has only one. However, there is the additional hardship factor in favor of Williams that removal of the child also would sever ties between him and his father. Pursuant to Section 244 of the Act, the matter of Agard was duly referred to the Congress. There was no adverse action taken by the Congress with the result that Agard was granted permanent residence. Matter of Agard establishes that the qualitative factors present in Williams are within the range contemplated by the Congress for a grant of suspension of deportation.

The petitioner herein has never even had a hearing on her request for suspension of deportation. The Board of Immigration Appeals is seeking to dismiss this matter

without considering its merits. That is an abuse of discretion.

Point III

Each and every statement and citation by the Board of Immigration Appeals in support of its decision of December 30, 1975, denying the motion to reopen deportation proceedings is either erroneous or inappropriate.

The Board of Immigration Appeals in denying the motion by the petitioner to reopen deportation proceedings states:

Although the respondent has at last achieved the minimum period of physical presence required for suspension under section 244(a)(1), this factor, by itself, is insufficient to warrant reopening.

The Board goes on to cite Matter of Sipus, Interim Decision 2172 (BIA, 1972) and Matter of Lam, Interim Decision 2136 (BIA, 1972). The citation of those two decisions in the context of the preceding language of the Board makes clear the significance of the words of limitation "by itself" quoted above. The conclusion arrived at is that mere attainment of seven years of physical presence without any other equities does not warrant reopening.

The Sipus decision (reproduced at appendix, p.62) concerns itself with a movant from the Philippines whose husband and five children appear to be residing in her home country. The Board notes with respect to hardship that deportation

far from causing extreme hardship by separating her from her family, would serve to reunite her with them.

The Board, in Sipus was also critical of the motion to reopen proceedings because it was "singularly lacking in factual detail". The Board also stated:

Since she can now establish the minimum required period of physical presence, we would ordinarily reopen and remand if her motion papers made out a prima facie case for reopening in other regards. (Emphasis supplied)

In Sipus, the movant merely stated that the respondent was statutorily eligible for suspension of deportation and that "counsel is prepared to present the necessary evidence at the time of hearing". The petitioner's motion herein went to considerable detail with respect to the hardship factors and was amply supported by documentation.

The Lam decision concerned itself with an applicant who appeared to have no equities in the United States and who was criticized for having used dilatory procedures in order to "eke out the minimum period of seven years' physical

presence." The Board concluded:

Where, as here, an alien manages to stave off deportation and accrue the minimum statutory period of physical presence only by resort to such obviously dilatory tactics, in the absence of other compelling circumstances sufficient to counterbalance such an adverse factor we are warranted in denying a motion to reopen purely as a matter of discretion. (Emphasis supplied)

The instant petition presents "other compelling circumstances" in the form of a six-year-old United States citizen child in danger of being uprooted from home, friends, school, and his father, and forced to exist in a hostile, debilitative and economically depressed environment - banished from the United States of America in which country he is entitled to reside by virtue of his citizenship.

Sipus and Lam should not be permitted to justify adverse action in this matter.

The Board continues, in the decision of December 30, 1975, by claiming:

The respondent has failed to make a prima facie showing of the "extreme hardship" required under section 244(a)(1).

That statement appears to be absurd. It has already been demonstrated by Aqard that similar equities have led to a grant of suspension of deportation with the acquiescence of the Congress.

The Black's Law Dictionary definition of "Prima Facie" is:

At first sight; on the first appearance;
on the face of it; so far as can be judged
from the first disclosure; presumably; a
fact presumed to be true unless disproved
by some evidence to the contrary....

Considering the allegations of hardship made with respect
to the fate of the child Sheldon Dean Williams, the Board's
finding is beyond comprehension.

Conclusion

The petitioner, who has lived a law abiding, decent,
and respectable life in the United States for more than seven
years, and whose deportation would result in extreme hardship
to both herself and her six-year-old United States citizen
child, should not be deported. She is statutorily eligible
for suspension of deportation and is worthy of the favorable
exercise of discretion by the Attorney General. The Board
of Immigration Appeals erroneously seeks to deprive the
petitioner of an opportunity to apply for suspension of
deportation. The Board of Immigration Appeals should be
directed to remand this matter back to an Immigration Judge
for consideration of an application for suspension of
deportation.

COPY RECEIVED

Robert B. Fiske Jr.
UNITED STATES ATTORNEY

7/3/26
Marian L. Bryant